83-2105

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. _____

GREEN CORPORATION and
HUTTON ELECTRIC COMPANY,

Petitioners,

v.

LOCAL UNION 59, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in upholding an arbitration award which is in conflict with prevailing labor law, in that the only meaningful remedies sought in the grievance arbitration proceedings constituted the application of the Petitioners' Collective Bargaining Agreement to a non-signatory employer, in conflict with decisions in other circuits.

2. Assuming, arguendo, that such an award in conflict with prevailing labor law should be upheld, whether the Fifth Circuit erred by refusing to review the adequacy or basis of an arbitrator's legal or factual finding, contrary to prior decisions of this Court and other circuits refusing to enforce arbitration awards which are irrational or totally baseless in law or fact.

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Petitioners, Green Corporation and Hutton Electric Company, Inc., respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 20, 1984.

OPINION BELOW

The Opinion of the Court of Appeals, which has not yet been reported, appears as Appendix B hereto. The Fifth Circuit denied Green Corporation's Motion for Rehearing in an Order dated March 20, 1984.

JURISDICTION

Petitioners' Motions for Rehearing to the Court of Appeals were denied in an Order entered March 20, 1984, and this Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in upholding an arbitration award which is in conflict with prevailing labor law, in that the only meaningful remedies sought in the grievance arbitration proceedings constituted the application of the Petitioners' Collective Bargaining Agreement to a non-signatory employer, in conflict with decisions in other circuits.

2. Assuming, arguendo, that such an award in conflict with prevailing labor law should be upheld, whether the Fifth Circuit erred by refusing to review the adequacy or basis of an arbitrator's legal or factual finding, contrary to prior decisions of this Court and other circuits refusing to enforce arbitration awards which are irrational or totally baseless in law or fact.

STATUTES INVOLVED

Labor-Management Relations Act §301, 61 Stat. 156, 29 U.S.C.A. §185 (1981):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

National Labor Relations Act, §7, 49 Stat. 452, 29 U.S.C.A. §157 (1981):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have

the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

STATEMENT OF THE CASE

Petitioners are electrical contracting companies located in Texas. Green Corporation is a union contractor which was founded and is owned by Jimmy R. Green. Hutton Electric Company is also an electrical contractor operating in the same market as Green. Hutton was organized and is owned by Jimmy R. Green as sole shareholder and director. Mr. Green organized these companies with the express purpose of operating a union and non-union shop in the same market area so as to be capable of bidding and performing work on projects requiring either union or open shop.[1/] In fact, Mr. Green so informed the International Brotherhood of Electrical Workers of this

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1/ This form of operation is known as operating "double breasted," which has been recognized as a legitimate form of doing business. See, e.g., Carpenters Local No. 1846 v. Pratt, Farnsworth, et al., 690 F.2d 489, 497 n.1, 504-509 (5th Cir. 1982), cert. denied, ____ U.S. ____, 104 S.Ct. 335, ____ L.Ed.2d ____ (1983).

intent and, at their request, lent his name to the union shop because the union representative felt that such an action would be economically advantageous to the union company due to Mr. Green's notoriety in the industry.

While Jim Green is the sole shareholder of Green and Hutton and served as the sole director of each Corporation until August of 1980, Mr. Green has never been a corporate officer of Hutton, nor has he ever received a salary from Hutton. Since August 28, 1980, H. W. Green has been the sole director, president and chief executive officer of Hutton. H. W. Green has never taken part in the management or operation of Green Corporation. During all relevant time periods they have maintained totally separate employees, estimating departments, finances, equipment and office facilities. In addition, the companies have not consulted on the bidding of separate jobs, and have acted as competitors bidding against each other on several projects. In response to a petition for representation of Hutton's employees by the union, it was determined that the employees of Hutton were an appropriate

bargaining unit. The union withdrew the petition the day before the election was to be held.

Despite the separate organization of these companies with the union's knowledge and initial blessing, the IBEW Local 59 filed a grievance against Green Corporation in March of 1980, claiming that the company had violated the third paragraph of Section 4.12 of the Collective Bargaining Agreement between the two parties. Subsquently, the grievance was amended to include an alleged violation by Green Corporation of Section 3.15 of the same collective bargaining agreement. Section 4.12 states in relevant part:

> If and when the employer shall perform any electrical work under its own name or under the name of another, or as a corporation, company, partnership or any other business entity, including joint venture, wherein the employer exercises any substantial degree of management, control, supervision, estimating, furnishing or loaning materials, trucks, tools and/or any other electrical equipment to another, the terms and conditions of this agreement shall be applicable to all such work.

Section 3.15 states:

> The Employer recognizes the Union as the exclusive representative of all its employees performing work in the jurisdiction of the union for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of

employment.

The Labor Management Committee established by the Collective Bargaining Agreement met to consider this grievance on March 31, 1980. There, IBEW Local 59 first presented its claim that the Green Corporation, acting through Jim Green, controlled Hutton, rendering the three a single employer. Based on this contention, the IBEW asserted that the collective bargaining agreement was violated by the failure of these entities to pay union wages and benefits on the employees employed by Hutton. The Union sought damages of $250 per day for each day of operation by Hutton, past and future, in violation of the agreement, and it also sought a directive for compliance with the agreement by Hutton. Hutton was not given any notice of this grievance, nor was it referred to in any way in the notice of the alleged violation. The committee failed to pass the Motion as the result of a tie vote. Another hearing was held on April 15, 1980, before the Interim Committee — the second step in the grievance procedure. Essentially the same evidence and claims were

presented by IBEW Local 59, and again the vote resulted in a tie vote.

IBEW Local 59 next brought its grievance before the Committee on Industrial Relations ("CIR"), the last step in the grievance procedure established by the collective bargaining agreement.[2/] A hearing was held on May 27, 1980. That same day the CIR issued a one sentence decision, finding that Green Corporation was guilty of the violations alleged in regard to Sections 3.15 and 4.12 of the collective bargaining agreement. No explanation of this conclusion was given, and no award of any affirmative relief was included in the decision. Again, Hutton was not informed or notified of the meeting, and no Hutton representative was present.

IBEW Local 59 filed suit in the U. S. District Court for the Northern District of Texas on July 9, 1980

[2/] The CIR is made up of union officials and contractors who are members of NECA, a national trade association which bargains through its local chapters with local IBEW unions. The vast majority of its members have agreements with IBEW local unions. See N.C.A. v. N.E.C.A., 498 F.Supp. 510, 515 (D.Md. 1980), aff'd, 678 F.2d 492 (4th Cir. 1982), cert. dismissed, ____ U.S. ____, 204 S.Ct. 26, ____ L.Ed.2d ____ (1983).

against Green Corporation and Hutton, seeking enforcement of the above-referenced arbitration decision. The case was tried to the Court on October 19, 1981. The evidence related to a recitation of the facts presented to the CIR; evidence (de novo) that the union's purpose was to apply the collective bargaining agreement to Hutton; and the history of the union's unsuccessful efforts to organize Hutton.

On December 16, 1981, the District Court remanded the arbitration award to the CIR, with instructions to state specifically the basis of its findings and conclusion. Thereafter, the CIR issued its supplemental decision, holding that Green Corporation and Hutton Electric are alter egos of Jimmy Green, and thus Green Corporation was in violation of the collective bargaining agreement, by reason of Hutton's noncompliance, based on its findings that:

(1) Jimmy R. Green was the sole shareholder of both Green Corporation and Hutton Electric Company;

(2) Jimmy R. Green was the sole director of both Green Corporation and Hutton Electric Company;

(3) Jimmy Green founded and incorporated Green Corporation and Hutton Electric Corporation within

a two-month period in the spring of 1979, thereby indicating a purpose of establishing and operating both union and non-union in the same market;

(4) In actual operation, Jimmy R. Green was the holder of the Master Electrician's license for both Green Corporation and Hutton Electric Company.

The CIR further reasoned that Green Corporation had violated §3.15, because:

(a) The Employer (Jimmy R. Green) recognized the union as the exclusive representative of his employees performing work within the jurisdiction of the union;

(b) The Green Corporation (Jimmy R. Green) and Hutton Electric Company (Jimmy R. Green) are performing work within the jurisdiction of the union. Jimmy R. Green was the single employer. Green Corporation (Jimmy R. Green) abides by the contract. Hutton Electric Company (Jimmy R. Green) does not abide by the contract. Therefore, Green Corporation (Jimmy R. Green) is in violation of Article 3.00, Section 3.15. (App. A., p. 19.)

The district court subsequently rendered judgment to Green Corporation and Hutton, concluding, "that the Union [was] not entitled to any affirmative relief in this action," as (1) the CIR exceeded its authority because its finding of a violation was without foundation in reason or fact; and (2) the IBEW failed to establish that it had suffered actual damages. (App. A, p. 46.) IBEW Local 59, filed a timely Notice of Appeal on July 22,

1981.

The Court of Appeals, in an Opinion by Judge Politz, refused to examine the correctness of the CIR's legal and factual conclusions and reversed the district court, reinstating the arbitrator's decision. (App. B, pp.11-12) Judge Politz stated that the court of appeals would "refrain from commenting on the correctness or incorrectness of the arbitrator's factual findings and legal conclusions," as that is not the function of the court. (App. A, p. 6.) Nor would the court "impress the law of corporations, contracts, evidence or other legal rules and concepts upon this situation and then measure the arbitrator's actions against them." (App. A, p. 6.) The court considered its ruling to be consistent "with the national arbitration policy and the many decisions limiting judicial oversight." (App. A, p. 6.) The court effectively established this as the standard for review of arbitration decisions in the Fifth Circuit, rejecting an express finding by the district court that the arbitrator's interpretation of the alter ego theory was in error, stating that this finding "is beyond judicial ken." (App. A, p. 4.)

REASONS FOR GRANTING THE WRIT

1. WHETHER THE FIFTH CIRCUIT ERRED IN ENFORCING AN ARBITRATION AWARD WHICH HAS THE EFFECT OF IMPOSING GREEN CORPORATION'S COLLECTIVE BARGAINING AGREEMENT UPON HUTTON'S EMPLOYEES, IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS HOLDING THAT SUCH ACTIONS VIOLATE THE RIGHTS OF SUCH EMPLOYEES, IS A QUESTION OF EXCEPTIONAL IMPORTANCE IN THE DETERMINATION OF FEDERAL LABOR RELATIONS POLICY

The Fifth Circuit's action below in reinstating the CIR arbitration decision clearly contradicts the long-established principle of freedom of choice for employees in selecting their bargaining representatives. It is essential that this Court review the Fifth Circuit's decision, as it is in clear contradiction to established legal principles as contained in prior decisions of this Court and other federal circuits.

When this action was first instituted at the arbitration level, IBEW Local 59 complained solely of Green Corporation's breaching the labor agreement by failure to pay union wages, union benefits and union dues with respect to the employees of Hutton. No question was raised with respect to Green Corporation violating the

agreement at all in connection with its operation or the wages, benefits or union dues on behalf of Green Corporation employees. Indeed, at the trial in the district court, IBEW Local 59's business agent confirmed that before the CIR, the Union had contended that there was a violation of the agreement by the Green Corporation. Since Local 59 considered Hutton and Green to be "the same" entity, it was their intention to force Hutton to pay the same wages and benefits.

In Local 59's Complaint filed in the district court seeking to enforce the CIR's decision, the relief requested included damages, injunctive relief and attorney's fees from both Hutton and Green. As the damages that IBEW Local 59 could have suffered related solely to the employees of Hutton, and as IBEW Local 59 sought injunctive relief against Hutton, it is clear that IBEW Local 59 could only be seeking the application of the collective bargaining agreement's terms to Hutton's employees, or recovery of alleged damages which it could only have suffered due to a failure of Green Corporation to apply the terms of the

collective bargaining agreement to the employees of Hutton.

Under the Fifth Circuit's decision in this case, the CIR's arbitration award would be reinstated and enforced against Green and Hutton, thereby requiring the application of the collective bargaining agreement to Hutton's employees without their consent and without any consultation with them in this regard. Such a result is in direct contravention to long-established federal law and policy in regard to labor relations. One of the key underpinnings of federal labor law in this country has been the policy of promoting freedom of choice for employees in selecting their bargaining agents. The right of employees to select their agents has been jealously guarded by the courts against employers as well as unions, who, in their own self interests, have attempted to usurp the rights of the employees and the authority of the NLRB to determine an appropriate bargaining unit, by entering into agreements with provisions like §4.12 of the agreement between Green Corporation and IBEW Local 59. Florida Marble

Polishers, Health & Welfare Trust Fund v. Edwin M. Green, Inc., 653 F.2d 972 (5th Cir. 1981), cert. denied, 456 U.S. 973, 102 S.Ct. 2235, 72 L.Ed.2d 755 (1982); Bakery Workers v. Hershey Chocolate Corp., 310 F.Supp. 1182 (M.D.Pa.), aff'd, 433 F.2d 926 (3rd Cir. 1970).

The decision by the Fifth Circuit in the instant case is inconsistent with the position of nearly every circuit which has addressed this issue. Even the Fifth Circuit has held that an arbitration award is not enforceable where that award is "repugnant" to the National Labor Relations Act. General Warehousemen and Helpers v. Standard Brands, 579 F.2d 1282 (5th Cir. 1978). Among the cases relying on this principle are cases in which the right of employees to select their bargaining agent has been assailed. Id. at 1293; Sperry Systems Management Association, Sperry Rand Corporation v. NLRB, 492 F.2d 63 (2d Cir.), cert. denied, 419 U.S. 831, 95 S.Ct. 55, 42 L.Ed.2d 57 (1974); Local 7-210, OCAW v. Union Tank Car Co., 475 F.2d 194 (7th Cir.) cert. denied, 414 U.S. 875, 94 S.Ct. 68, 38 L.Ed.2d 120 (1973); Glendale Mfg. Co. v. Local No. 520, ILG-WU, 283 F.2d

936 (4th Cir. 1960), cert. denied, 366 U.S. 950, 81 S.Ct. 1902, 6 L.Ed.2d 1243 (1961). In Sperry Systems, the union attempted to require an employer to comply with an arbitration award providing that wages of employees in a California bargaining unit should be governed by terms of employment contained in the employer's agreement with a New York labor union. The employer had opened a new plant in California. The union learned that the California employees, although performing similar work, were paid lower wages. 492 F.2d at 65. The union filed a grievance with the company demanding that the company apply the New York City agreement to the California employees, claiming that the company had violated a provision of the collective bargaining agreement which provided that the agreement would "apply to all plants now operated by the employer, its successors and assigns, wherever situated." Id. at 65.

The arbitrator found that he could not apply the representational provisions of the collective bargaining agreement to the California employees without vio-

lating their right under the Act not to organize. However, he did require that Sperry comply with the wage and other conditions of employment as outlined in the collective bargaining agreement for the New York unit. The union attempted to justify its position and the award by stating that they were not seeking to represent the California workers, but were merely attempting to protect the jobs of the New York workers which might be threatened if the company were allowed to pay lower wages in California. Id. at 65-66.

The company filed a complaint with the NLRB, claiming that the union's efforts to enforce the arbitration award constituted an unfair labor practice of refusing to bargain collectively. The Board ruled in favor of the union, and the employer appealed. The Second Circuit refused to enforce the award, stating that the union's actions, in fact, did constitute an unfair labor practice insofar as they were attempting to usurp the California employees' right to choose their own labor representative. Id. at 69. The court stated:

> [R]egardless of the Union's motive in seeking enforcement of the arbitration award, it commited an unfair labor practice because the subject of the wages and working conditions of the [California] employees was not a permissible subject of bargaining in the New York City unit. Section 7 of the Act guarantees employees the right to organize and bargain collectively and the right to refrain from such activities. Generally, an employer commits the unfair labor practices of interfering with employees' §7 rights and supporting a union in violation of §8(a)(1) and (a)(2) when it imposes on employees of one unit the contract and bargaining agent of another unit. Id. at 69 (Emphasis added.)

The Fifth Circuit's decision in the instant case, based on a very analogous factual situtation, stands in direct conflict with the Second Circuit's decision in Sperry, particularly considering the fact that the arbitration panel in the instant case (the CIR) could hardly be considered "impartial," a premise which underlies all judicial precedent constricting the review of labor arbitration awards. See, e.g., Gulf States Telephone v. Local 1692, 416 F.2d 198 (5th Cir. 1969); B. Dunau, Labor Arbitration, 55 Va.L.Rev. 427, 436-439 (1969). The fact the CIR consisted of all union personnel and union contractors preordained its decision, considering Hutton was not even present to defend itself in such a hostile forum. It is correct that neither the district court nor

the CIR have fashioned a remedy. However, any remedy which could be fashioned to meet the union's requested relief, would effectively apply the collective bargaining agreement to Hutton's employees and would penalize Green for failing to force Hutton to do so, either one of which invades the province of the NLRB and violates the §7 rights of Hutton employees.

2. THE FIFTH CIRCUIT MISAPPLIED LONGSTANDING STANDARDS OF JUDICIAL REVIEW OF ARBITRATION AWARDS, TOTALLY ABDICATING ITS AUTHORITY AND RESPONSIBILITY TO MAKE ANY MEANINGFUL REVIEW OF THE FACTUAL AND LEGAL SUPPORT FOR THE AWARD

In rendering its decision, the court of appeals in Sperry, supra, of necessity, examined the record of the arbitration proceeding, the evidence presented and the arbitrators' interpretation of applicable law to determine the basis for and the enforceability of, this award. In contrast, the Fifth Circuit totally abdicated its authority and responsibility to review the arbitrator's award as had been exercised by the district court. This rationale is in total conflict with the applicable decisions of other circuits, as it would allow such an award to be enforced even where, as here, the award is

in direct violation of federal labor law and policy. The reinstatement of this award by the Fifth Circuit supports IBEW Local 59's attempt to gain de facto, if not actual, representational rights in regard to the employees of Hutton, and is therefore in conflict with the decisions of the other circuits which have gone beyond the face of the arbitrators' award to the extent necessary to determine whether the award is in violation of federal law.

This issue poses a vital concern to corporations or other employer entities which operate "double breasted"[3/] or, in fact, any entity whose employees are represented by a union. If the Fifth Circuit's decision is allowed to stand, and arbitration awards are upheld and enforced by the federal court without any review whatsoever, unions will be able to gain the representational rights of non-unionized employees without troubling with the necessity of compliance with the NLRA procedures or law. A huge body of federal labor law will have been repealed by the federal courts'

3/ See note 1, supra.

inaction with regard to contrary arbitration decisions. Finally, these questions are presented in a form incontestably ripe for resolution by this Court, with no factual disputes to obscure the legal analysis necessary for their adjudication.

While the power of the federal courts to review arbitration decisions and awards is limited, this power has never before been precluded altogether. It is well settled that the federal courts are empowered to examine arbitration decisions in order to determine whether the award is irrational and to ascertain whether the award is derived from the essence of the collective bargaining agreement. E.g., Gunther v. SanDiego & A. E. Ry. Co., 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308 (1965); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In the case at issue, the Fifth Circuit has circumscribed its power to examine arbitration awards even more closely. In spite of the express finding of the district court that the arbitrator's award did not comport with legal interpretation

of the alter ego theory as established by this Court and the federal courts of appeals, see, e.g., South Prarie Const. Co. v. Local 627 I.U.O.E., 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976); Carpenters Local 1846 v. Pratt-Farnsworth, et al., supra, the court below completely abdicated review of the award, allowing it to stand despite its lack of basis in law or fact. This decision, if allowed to stand, will authorize arbitration awards which are clearly erroneous and which reach beyond the power contemplated by the parties as being granted to the arbitrators.

In Loveless v. Eastern Airlines, Inc., 681 F.2d 1272 (11th Cir. 1982), the Eleventh Circuit addressed an award rendered by an arbitrator which interpreted the collective bargaining agreement. Id. at 1273-1274. The dispute in Loveless turned upon certain terms of the collective bargaining agreement, the interpretation of which would determine if three pilots would be eligible for supplemental retirement benefits. Id. at 1274. The employer won the arbitration proceeding based on evidence that went beyond the language of the contract

to indicate the intent of the parties as to which employees would receive these benefits. Id. at 1274. Stating that the "substantive grounds for vacating labor arbitration awards that do exist are extremely narrow," the court of appeals found that it was empowered to review the arbitration award at issue, including its legal and factual bases. Id. at 1275-76. The court found that the arbitration award "was rational" and not wholly baseless or completely without reason, and was, therefore, enforceable. Id.

In these decisions, the courts have not refused, as did the Fifth Circuit in the instant case, to apply prevalent legal principles to the contract at issue. In Loveless v. Eastern Airlines, Inc., supra, the court went to great lengths in applying long-standing contract interpretative tools to the language in question to determine whether the arbitrators' award was legally supportable and thereby enforceable. Id. at 1279-1280. Further, in enforcing the award of the Railroad Adjustment Board in Gunther v. San Diego & A. E. Ry. Co., supra, this Court noted that the Board was

familiar with the daily operations of workers and employers and knew "the industry's language, customs, and practices." Id. at 261. Also, the Board's decision showed that it "construed the collective bargaining provisions together with other provisions of the contract in rendering its award." Implicitly relying upon the Board's construction of industry practices and the provisions of the contract as a whole, which are longstanding contract interpretative tools, the Court held that the award was enforceable. Id.

In holding that the factual and legal basis of arbitration awards are "beyond judicial ken" (App. A. p. 10.), and that it would not impress the law of corporations and contracts upon arbitration awards, the Fifth Circuit has gone beyond the decision of any other court of appeals or this Court in applying the deference to be paid arbitration awards. In failing to review the factual basis of an award which penalizes Petitioners Green and Hutton for an alleged alter ego relationship, and applying that award to Hutton even though Hutton was not given the opportunity to participate in the

arbitration, and did not do so, the court of appeals totally abdicated all review and oversight over the arbitration process. The deference paid to arbitration awards is designed to promote arbitration as the parties' choice as a dispute resolution mechanism. The result in this case would accomplish just the opposite.

Never before have the courts gone so far as to authorize an arbitration award clearly inconsistent with federal law and the facts of the particular case, as such an action would go beyond mere deference to the parties' choice of dispute resolution procedures. The standard of judicial review as defined by the Fifth Circuit in the instant case would allow an arbitrator to outlaw a situation which is not favored by the arbitrator, although the award, as herein, does "not comport with the legal interpretation" of federal labor law. (App. B, p. 10.) Such a rule or standard of review would only encourage prudent businesses to never agree to arbitration provisions in their contracts, because they would never know what "rules" applied to the operation of their businesses.

We submit that these issues are uniquely ripe for this Court's resolution and should be determined by this Court before the unusual ruling of the Fifth Circuit becomes the rule for the future, thereby jeopardizing not only the existence and continuance of business entities and business relationships which were established in reliance upon federal labor law (but which may not be observed by an arbitrator), but also the continuance of arbitration as a principal dispute resolution mechanism in the labor management field.

CONCLUSION

The Fifth Circuit in its opinion below would pass off its decision in this case as a routine affirmance of an arbitration award, having found that the award "draws its essence" from the collective bargaining agreement. Petitioners respectfully submit that the court's opinion goes far beyond that premise, both in what it says and what it does not say. If allowed to stand, this opinion sets a dangerous precedent for a federal court to totally refuse to review the arbitration record to determine

whether an award is irrational or totally contrary and repugnant to applicable principles of law upon which the award purportedly rests. Further, the decision in this case also directly threatens a particular form of doing business, "double breasting" with separately-run union and non-union businesses, which has been recognized as completely legitimate by this Court, the courts of appeals, and the National Labor Relations Board, for at least the last twenty years. Finally, the direct result of this decision is to undermine the fundamental policy behind the federal labor laws, the protection of the individual's right to organize, collectively bargain, and choose one's own collective bargaining representative, based upon the false premise that the court's rationale is necessary to promote the laudatory goal of encouraging arbitration of disputes. We respectfully urge

the Court to grant review of this case, in order to clarify where the balance between these conflicting policies lies.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOCAL UNION 59 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Plaintiff,

v.

GREEN CORPORATION and HUTTON ELECTRIC COMPANY,

Defendants

Civil Action File No. CA-3-80-1146-D

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff Local Union 59, International Brotherhood of Electrical Workers, AFL-CIO (the "Union"), is a labor organization representing employees who are in industries affecting commerce.

2. Defendant Green Corporation is a Texas corporation with its principal office in Dallas, Texas. Green Corporation was incorporated on February 21, 1979 by Jimmy R. Green, the sole shareholder of Green Corporation. Green Corporation performs electrical

work and electrical installations as a union contractor.

3. Defendant Hutton Electric Company ("Hutton") is a Texas corporation with its principal offices in Dallas, Texas. Hutton was incorporated on May 11, 1979 by Jimmy R. Green, its sole shareholder. Jimmy R. Green's brother, H.W. Green, is the president and chief executive officer of Hutton. Hutton performs electrical work and electrical installations as a non-union contractor.

4. On July 19, 1979, Green Corporation and the Union signed a Letter of Assent whereby Green Corporation and the Union became parties to a collective bargaining agreement (the "labor agreement"). Under the labor agreement, Green Corporation recognized the Northeast Texas Chapter of the National Electrical Contractors Association ("NECA") as the bargaining representative for Green Corporation employees in all matters arising under the labor agreement.

5. In March 1980, the Union filed a grievance against Green Corporation for alleged violations of the labor agreement. The activities on the part of Green

Corporation which constitute the alleged violations of the labor agreement include the operation and control of Hutton such that Hutton's employee benefits and wages are below those established in the labor agreement as well as Hutton's employment of non-Union employees in electrical construction within the Union's territorial jurisdiction, which creates competition with Union members for jobs, loss of Union dues and fringe benefit contributions, and the weakening of Union bargaining power.

6. The Union contends that these activities violate two sections of the labor agreement. The first is Article 3.00, section 3.15 which provides:

> The Employer recognizes the Union as the exclusive representative of all its employees performing work within the jurisdiction of the Union for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

The second is Article 4.00, section 4.12, which provides in relevant part:

> If and when the employer shall perform any electrical work under its own name or under the name of another, or as a corporation, company, partnership or any other business entity, including joint ventures, wherein the employer exercises any

> substantial degree of management, control, supervision, estimating, furnishing or loaning materials, trucks, tools and/or any other electrical equipment to another, the terms and conditions of this agreement shall be applicable to all such work.

7. Pursuant to the labor agreement, the Union filed its grievance with the Labor Management Committee. This Committee failed to resolve the grievance because of a tie vote.

8. The Union then presented its grievance under the labor agreement to the Interim Committee, which is a regional labor management committee. This Committee, because of a tie vote, also failed to resolve the grievance.

9. The Union and Green Corporation subsequently submitted their grievance to the Council on Industrial Relations for the Electrical Contracting Industry (the "CIR") in Washington, D.C. The CIR is the duly designated arbitration committee prusuant [sic] to the labor agreement,[1/] and is comprised of six representatives

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[1/] The labor agreement provides:

> Should the Labor-Management Committee fail to agree or to adjust any matter, such may be submitted jointly or unilaterally by the parties to this agreement to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decisions shall be final and binding on both parties hereto.

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of NECA and six representatives of the International Brotherhood of Electrical Workers.

10. In order to determine whether Green Corporation exercised a substantial degree of management, control or supervision over Hutton, the CIR was presented with evidence indicating that Jimmy R. Green was sole owner and director of both corporations, he solicited business on one occasion for both corporations, and he allowed his master electrician's license to be used by Hutton.

11. Prior to the CIR proceeding, Jimmy R. Green withdrew his master electrician's license from use by Hutton.

12. After the Union and Green Corporation submitted their briefs and oral argument was heard, the CIR rendered a unanimous decision on May 27, 1980.

The decision in its entirety provides:

> After careful consideration of the evidence submitted, the Council rules as follows:
>
> 1. and 2. In the instant case Green Corporation is found in violation of Article 3.00, Section 3.15 and the third paragraph of Article 4.00, Section 4.12 of the agreement.

The CIR entered no opinion, findings or conclusions other than the above cited paragraph. The CIR failed to determine what damages, if any, the Union demonstrated, and failed to specify what action, if any, Green Corporation should take to remedy the violations of the labor agreement. The CIR thus failed to provide any affirmative relief whatsoever for the ostensible violations.

13. The Union subsequently filed its action in district court on August 26, 1980, seeking damages and injunctive relief against Green Corporation to enforce the terms of the labor agreement and the CIR's ruling.

14. The Union seeks to enforce the labor agreement and CIR ruling against Hutton as well. The Pre-Trial Order in this action indicates that the Union's claims against Hutton are based on its alleged status as a

necessary party, given the "interrelationship" of it and Green Corporation. According to the Pre-Trial Order, the Union finds support for this contention in the CRI's [sic] holding that Green Corporation violated Section 4.12, which refers to an employer performing electrical work "under the name of another . . . ."

15. On August 28, 1980, Jimmy R. Green resigned as the sole director of Hutton.

16. On July 13, 1981, the Union filed a Petition for an election among Hutton employees, thereby invoking the jurisdiction of the National Labor Relations Board (the "NLRB"). A hearing was held on the Union's Petition.

17. In the NLRB's subsequent decision, it directed that an election be held and described a bargaining unit of Hutton employees consisting of journeymen and apprentice electricians including project foremen.

18. The Union withdrew its Petition for an election on the day prior to the date of the scheduled election. The election did not take place.

19. The evidence presented at trial demonstrated

that Jimmy R. Green has never been a corporate officer of Hutton; nor has he ever received a salary from Hutton or been on its payroll. Hutton and Green Corporation maintain separate books, accounts, and lines of credit although they employ the same accounting firm. They have different telephone numbers, locations, stationery and office supplies, and maintain separate ownership of material and equipment. There is no cross-over of employees between Green Corporation and Hutton, and the two companies employ different general contractors, pay scales, fringe benefits and working conditions. Hutton operates as a merit shop and makes its own hiring decisions. Hutton has its own estimating department and in fact competes against Green Corporation for bids on contracting jobs. Green Corporation does not sublet, assign or transfer work to Hutton. The evidence demonstrated that on at least one occasion, Hutton contracted with Green Corporation for Green Corporation to perform the design plans for a project in which Hutton was the electrical contractor. Hutton contacted Green Corporation for

this design work before Hutton could bid for the contracting job and compensated Green Corporation for its services. In addition, the evidence demonstrated that on one occasion Jimmy R. Green, acting individually as the owner of Green Corporation and Hutton, solicited work for both corporation [sic] in a letter written on Green Corporation stationery.

Conclusions of Law

1. This Court has jurisdiction over the present controversy pursuant to Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C.A. §185.

2. The standard of review in the present actions is very narrow. In General Drivers, Warehousemen and Helpers, Local 89 v. Ress & Co., 372 U.S. 517 (1963), the Supreme Court held that the grievance procedure award of a joint labor committee is reviewable and enforceable by the courts so long as the parties selected this mechanism as their chosen instrument for the definitive settlement of grievances pursuant to a collective bargaining agreement. Furthermore, if the award is enforceable, the court [sic] are not to reweigh

the merits of the grievance. This standard of review is consistent with that announced in the Supreme Court's landmark United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960), in which the Court endorsed arbitration as the preferred means of settling labor disputes.2/ The function of the courts is basically one of assuring that the arbitration award is legitimate

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2/ This is one of the three decisions comprising the "Steelworkers Trilogy." The other two are United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) and United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

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and "draws its essence from the collective bargaining agreement." Enterprise Wheel, 363 U.S. 593, 597. This is because the arbitrator's construction of the labor agreement is the one "which was bargained for and . . . the courts have no business overruling him because their interpretation of the contract is different from his." Id. On the other hand, if the jurisdiction over arbitration awards that Congress bestowed on the courts is not to be rendered meaningless, the courts must have

some latitude to review arbitration awards. The Fifth Circuit has thus established that the courts are to vacate an arbitrator's award only when it is "without foundation in reason or fact." Int't [sic] Assoc. of Machinist & Aerospace Workers v. Modern Air Transport, Inc., 495 F.2d 1241, 1244 (5th Cir.) cert. denied, 419 U.S. 1050 (1974); Boise Cascade Corp. v. United Steelworkers Local 7001, 588 F.2d 127 (5th Cir.), cert. denied, 444 U.S. 830 (1979).

3. The Court is of the opinion that the CIR's one sentence decision provides no basis on which the Court may determine whether the CIR's "reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." Safeway Stores v. American Bakery & Confectionary Workers Local 111, 390 F.2d 79, 82 (5th Cir. 1968). Consequently, the Court believes that a proper resolution of the present dispute requires a remand so that the CIR may state in writing the factual predicate upon which it based its determination that Green Corporation violated the labor agreement. Storer Broadcasting Co. v.

American Federation of Television and Radio Artists, 600 F.2d 45, 47 (6th Cir. 1979). Cf. United Steelworkers v. W.C. Bradley Co., 551 F.2d 72 (5th Cir. 1977); San Antonio Newspaper Guild Local 25 v. San Antonio Light Division, 481 F.2d 821 (5th Cir. 1973) (remand to original arbitrator is normally the proper course of action for clarification of ambiguous award); General Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), cert. denied, 441 U.S. 957 (1979) (case remanded to arbitration for determination of damages where enforcement of original award would constitute unfair labor practice).

In reaching the above conclusion, the Court recognizes that none of the parties has requested a remand for the purpose of documenting which evidence in the record [3/] the CIR considered in reaching its

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[3/] The Union suggested for the first time in its post-trial brief that a remand would be appropriate for purposes of clarifying the CIR's intended remedy. Green Corporation objects to a remand for a formulation of relief because it believes, inter alia, that the CIR was aware of, but specifically declined to award, damages sought by the Union and that this decision ostensibly refusing affirmative relief was final and

binding under the terms of the labor agreement. The Court need not reach these objections for it is ordering a remand to the CIR which is limited to an explanation as to what facts it considered in reaching a decision. The Court further notes that in the event there is a failure by the CIR to support its decision by reference to facts in the record, a remand on the damages issue will be moot, for the Court will not be able to enforce an award which has no basis in fact.

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4. The Court is of the opinion that this action should be remanded to the CIR. The CIR should be ordered to explain the factual basis of its decision. In the event that the CIR based its decision that Green Corporation violated the labor agreement on account of the relationship between Green Corporation and Jimmy R. Green, then the CIR should be further instructed to indicate what evidence, if any, it considered which would demonstrate that Green Corporation is merely the alter ego of Jimmy R. Green, such that Green Corporation is completely controlled by Jimmy R. Green and he, not Green Corporation, is the real party to the labor agreement.

It is so ORDERED.

Dated this 16 day of December, 1981.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOCAL UNION 59 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Plaintiff,

v.

GREEN CORPORATION and HUTTON ELECTRIC COMPANY,

Defendants

Civil Action File No. CA-3-80-1146-D

O R D E R

This action came on for trial before the Court, the Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that this action is remanded to the Council on Industrial Relations for the Electrical Contracting Industry (the "CIR"):

(1) to explain the factual basis of its decision of May 27, 1980, rendered in the grievance between plaintiff Local Union 59 International Brotherhood of Electrical Workers, AFL-CIO and defendant Green Corporation growing out of a collective bargaining agreement between the parties; and

(2) in the event that the CIR based its decision that Green Corporation violated the labor agreement on account of the relationship between Green Corporation and Jimmy R. Green, the CIR should indicate what evidence, if any, it considered which would demonstrate Green Corporation is merely the alter ego of Jimmy R. Green, such that Green Corporation is completely controlled by Jimmy R. Green and he, not Green Corporation, is the real party to the labor agreement.

Dated this 16 day of December, 1981.

/s/
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOCAL UNION 59 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Plaintiff,

v.

GREEN CORPORATION and HUTTON ELECTRIC COMPANY,

Defendants

Civil Action File No. CA-3-80-1146-D

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been remanded to the Council on Industrial Relations pursuant to this Court's December 16, 1981 Findings of Fact and Conclusions of Law ("December 16 Findings"), and having received the clarification issued by the Council on Industrial Relations, the Court hereby makes the following supplemental findings of fact and conclusions of law. The abbreviations of the parties' names utilized in the December 16 Findings are followed herein.

Findings of Fact

1. Upon remand, the CIR clarified the factual basis

for its finding that the labor agreement was violated. The CIR indicated that its conclusion was based on the following "facts":

1. Jimmy R. Green was the sole shareholder of both Green Corporation and Hutton Electric Company.

2. Jimmy R. Green was the sole director of both Green Corporation and Hutton Electric Company.

3. Jimmy R. Green founded and incorporated Green Corporation and Hutton Electric Corporation within a two-month period in the spring of 1979 thereby indicating a purpose of establishing and operating both union and non-union in the same market. His letter of January 18, 1980, to Mr. John Harris clearly outlined his operations in the fourth paragraph.

4. In actual operation, Jimmy R. Green was the holder of the Master Electrician's license for both Green Corporation and Hutton Electric Company. This fact was clearly documented. This fact was readily acknowledged by Jimmy R. Green. A master electrician is required by ordinance to be responsible for and supervise all electrical work performed. This clearly establishes that Jimmy R. Green exercised supervision over the operations of both organizations.

2. The CIR concluded, based on its own findings of fact, that Hutton is the alter ego of Jimmy R. Green and Green Corporation. The CIR stated:

> [These four facts] clearly established in the minds of the members of CIR that Jimmy R. Green was in fact the employer and that Hutton Electric Company was merely the alter ego of

Jimmy R. Green and Green Corporation.

3. The CIR explained its reasoning underlying the ultimate conclusion that the labor agreement was violated. It stated:

> The violation of Article 3.00, Section 3.15 is reasoned as follows:
>
> (a) The employer (Jimmy R. Green) recognized the union as the exclusive representative of his employees performing work within the jurisdiction of the union.
>
> (b) Green Corporation (Jimmy R. Green) and Hutton Electric Company (Jimmy R. Green) are performing work within the jurisdiction of the union. Jimmy R. Green was the single employer. Green Corporation (Jimmy R. Green) abides by the contract. Hutton Electric Company (Jimmy R. Green) does not abide by the contract. Therefore, Green Corporation (Jimmy R. Green) is in violation of Article 3.00, Section 3.15.
>
> The same reasoning supports a violation of the third paragraph of Article 4.00, Section 4.12. The employer (Jimmy Green) agreed to perform any electrical work, under his own name or under the name of another, under the terms and conditions of the collective bargaining agreement. Green Corporation (Jimmy R. Green) complied. Hutton Electric Company (Jimmy R. Green) did not. Jimmy R. Green exercises substantial management, control and supervision of Hutton Electric Company. Therefore, a violation of the collective bargaining agreement language in Article 4.00, Section 4.12 occurred.

4. Jimmy R. Green letter to John Harris which the CIR referred to in its third finding, see Finding of Fact

1(3), states in relevant part:

> It has been quite awhile since I talked with you, so the purpose of this letter is to bring you up to date about my companies. . .
>
> I formed Green Corporation, a union shop operation, in March 1979 and Hutton Electric Company, a merit shop operation, in June 1979. I have enjoyed substantial success in both companies and we employ some of the best qualified people in our market area.

See Defendant Green Corporation's Exhibit 1A.

5. The letter of the City of Dallas, attached to the Union's brief which was submitted to the CIR, states in relevant part:

> This letter will certify that Mr. J. R. Green is registered as a required Master Electrician for the electrical firm by the name of Hutton Electric.

See Defendant Green Corporation's Exhibit 1A.

6. The affidavit of the City of Waco, attached to the Union's brief, which was submitted to the CIR, states in relevant part:

> In consideration of the City of Waco . . . issuing to HUTTON ELECTRIC COMPANY an electrical contractor's license . . . do hereby state that Jim R. Green is a [sic] Owner of HUTTON ELECTRIC COMPANY and that a Master Electrician license has been issued to him by the City of Waco, Texas.

See Defendant Green Corporation's Exhibit 1A.

7. Section 2.04(d) of the labor agreement provides:

> Should the Labor-Management Committee fail to agree or to adjust any matter, such may be submitted jointly or unilaterally by the parties to this agreement to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decisions will be final and binding on both parties thereto.

See Plaintiff's Exhibit B.

8. With respect to any remedy to which the Union may be entitled, the CIR stated:

> The CIR did not consider the issue of remedy since none was requested and no supporting data was submitted by the Local Union to indicate what, if any, actual damage may have resulted to the Local Union as a result of these violations.

Conclusions of Law

A. The arbitration award is without foundation in reason or fact.

The CIR express finding that Hutton is the alter ego of Jimmy R. Green Corporation and the CIR's implicit finding that Green Corporation is the alter ego of Jimmy R. Green do not comport with the legal interpretation of the alter ego threory. [sic] In Local Union No. 59, International Brotherhood of Electrical

Workers v. Namco Electric, Inc., 653 F.2d 143 (5th Cir. 1981), the plaintiff union sought to bind the defendant to a collective bargaining agreement on the basis that the defendant was the alter ego of a corporation which signed the agreement. The Namco court rejected the union's alter ego proposition, for it found that the defendant and signatory corporation did not have officers or employees in common and did not engage in common purchasing of materials or equipment. In addition, the plaintiff union had been certified as the bargaining agent only for the signatory's employees and not for the defendant's employees. While there was evidence that (1) the defendant and the signatory were owned by the same person; (2) the two companies occasionally exchanged tools and machinery and (3) the signatory had estimated job costs for some of the defendant's bids, these factors were not sufficient to support a finding that the defendant was the alter ego of the signatory such that the two companies constituted a single employee for collective bargaining purposes.

The Fifth Circuit again recently considered whether a collective bargaining agreement could be enforced against a non-signatory based on its relationship with the signatory. In Florida Marble Polishers, Health and Welfare Trust Fund v. Edwin M. Green, Inc., 653 F.2d 972 (5th Cir. 1981), cert. denied, 110 LRRM 2320 (1982), the Fifth Circuit evaluated the relationship on the basis of the four factors which were established in Radio & Television Broadcast Technicans [sic] Local Union 1264 v. Broadcast Service, 380 U.S. 225, 256 (1965), for the purpose of determining when nominally separate business entities are sufficiently integrated to be considered a single employer. The four factors, which include (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control, id, have been equated with those necessary to establish the existence of an alter-ego relationship. See Florida Marble, 653 F.2d at 975; United Telegraph Workers v. N.L.R.B., 571 F.2d 665, 668 (D.C. Cir.) cert. denied, 439 US 827 (1978). In Florida Marble, the same

individual owned 50% of the stock in a corporation employing union workers and 98% of the stock of a non-union corporation. He served as the president of the unionized corporation and assumed all of its managerial and executive duties for a period of time. He also managed the nonunionized corporation for a short period of time. Despite this simultaneous management of the two businesses and some overlap in their operations, the Court found that they did not constutute [sic] a single employer. The primary operations were separate, and each business had its own location, as well as separate capital, bank accounts and lines of credit. There were no commingling of funds, joint participation on the same job site, or loss of work by the union employees on account of the non-union employees. The court's reasoning was not altered by the fact that the two entities experienced some overlap in operations, joint employment of some sales people, and cross-leasing of equipment. In addition, the unionized corporation purchased some of the supplies and owned a parking area utilized by both corporations; the court observed,

however, that the nonunionized corporation paid a fair market price for these services. The court concluded that the entities were separate, and the collective bargaining agreement thus could not be enforced against the nonunionized corporation. Id. at 976. See also A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc. and Road Sprinkler Fitters Local 669, 233 NLRB 38 (1977).

As stated in the December 16 Findings, a reviewing court is not to reweigh the merits of the grievance, but is limited to determining whether the arbitrator's decision is "without foundation in reason or fact." Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co., 415 F.2d, 411-412 (5th Cir.), cert. denied, 396 U.S. 1008 (1970); International Ass'n of Machinists and Aerospace Workers [sic] Modern Air Transport, Inc., 495 F.2d 1241, 1244 (5th Cir.), cert. denied, 419 US 1050 (1974); see United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The Fifth Circuit explained the meaning of this phrase in Brotherhood of R.R. Trainmen, 415 F.2d at 411-412:

> In the arbitration context, an award "without foundation in reason or fact" is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When is [sic] is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration had "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract.

In circumscribing this limited power of review, the Fifth Circuit further cautioned that reviewing courts are not to take over the arbitrator's function "under the guise of the arbitrator not having 'authority' to arrive at his ill-founded conclusions of law or fact . . . ." Dallas Typographical Union No. 173 v. A. H. Belo Corp., 372 F.2d 577, 581 (5th Cir. 1967).

The stringent limitations imposed on a court which reviews an arbitration award are clearly demonstrated in the Fifth Circuit's recent decision in Boise Cascade v. United Steelworkers, Local 7001, 588 F.2d 127 (5th Cir.), cert. denied, 444 U.S. 830 (1979). In Boise, a union grievance was submitted to arbitration for the

purpose of determining whether the employer, by reducing hourly wages to employees who elected lower paying temporary jobs in lieu of a temporary lay off, violated a specific clause in the collective bargaining agreement. The district court vacated the arbitrator's finding that the employer violated the agreement based on the court's view that the agreement was unambiguous and that the arbitrator's order did not draw its essence from the agreement. The Fifth Circuit reversed the trial court, holding that the arbitrator's conclusion that the agreement was ambiguous was not devoid of reason or fact, and the arbitrator's finding of ambiguity justified his resort to evidence which was extrinsic to the collective bargaining agreement. The Court of Appeals relied on the Supreme Court's decision in Enterprise Wheel:

> The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Boise Cascade, 588 F. 2d at 128, quoting Enterprise

Wheel, 363 U.S. at 599.

The Court acknowledges that the enforcement of the arbitration award in Boise Cascade states the rule rather than the exception with respect to a court's power of review in the arbitration context. Exceptions do exist, however. One example is Aeronautical Machinists Lodge 709 v. Lockheed-Georgia Company, 521 F.Supp. 1327 (N.D. Ga. 1981), which this Court finds is more factually analogous to the case at bar than is Boise Cascade. In Lockheed-Georgia, the union claimed that the company's denial of access to the union's business representative with respect to company property violated the collective bargaining agreement. The court had previously remanded the case to the arbitrator for clarification on the issue of whether the company had violated the agreement. In its remand order, the court indicated that the arbitrator's first award and opinion went beyond the issue submitted because the arbitrator had suggested that the company was justified in denying access, but had not determined whether or not the company violated the agreement.

The arbitrator entered a supplemental opinion following the remand and found that the company did not violate the agreement. Acknowledging that a court "is not to review the merits of the award, including the findings of fact and construction and application of the collective bargaining agreement," id. at 1329, the court stated that the arbitrator's supplemental opinion was based on the faulty first award which contravened the court's identification of the determinative issue. In conclusion, the court held that the arbitrator

> 'does not sit to disperse his own brand of industrial justice.' His authority was limited to deciding the issues submitted to him. Thus, in considering whether the company was justified in its action he went beyond his authority and this Court has no choice but to refuse enforcement of the award.

Id. at 1329, quoting from Communications Workers v. Western Electric, Inc., 397 F.Supp. 1318, 1323 (N.D. Ga. 1975), aff'd 558 F.2d 816 (5th Cir. 1977) (per curiam).

The Court is of the opinion that the issues herein most closely resemble those in Lockheed-Georgia: the CIR made no finding that the labor agreement was ambiguous, and thus the CIR could not refer to extrinsic evidence. Boise Cascade, 588 F.2d 127 at 128. The

sole task of the CIR was to determine whether Green Corporation violated the labor agreement. The parties themselves, including the Union, have consistently and unambiguously characterized this as the determinative issue. 1/

1/ The Union's Complaint in this action names Green Corporation, and not Jimmy R. Green, as a Defendant, and the Complaint asserts that Green Corporation violated the labor agreement. The Union's brief, which was filed with the CIR, alleges that "Green Corporation is signatory to" the labor agreement and urges the CIR to find that Green Corporaton violated the Labor agreement. See Defendant Green Corporation's Exhibit 1A. Likewise, the original grievance notices and the minutes of the first local hearing refer respectively to Green Corporation as the party in interest and Green Corporation's control of Hutton. See Defendant Green Corporation's Exhibits 2 and 4. The minutes of the Interim Committee hearing refer to Green Corporation's violations and note that Jimmy R. Green appeared on behalf of Green Corporation. See Defendant Green Corporation's Exhibit 5.

Although the materials cited in note 1 clearly refer to Jimmy R. Green's active participation with respect to both companies, the alleged violator of the labor agreement is consistenly [sic] identified as Green Corporation. Moreover, the Union deliberately and volun-

tarily chose to enter a contract with Green Corporation, even though at that time it knew of Hutton's intent to operate as a non-union employer as well as Jimmy R. Green's ownership of Hutton and Green Corporation.

It thus appears that the CIR has altered the theory of the grievance before it. By finding that Jimmy R. Green violated the collective bargaining agreement, the CIR has strayed beyond the narrow issue presented for its determination: whether Green Corporation violated the labor agreement? It thus cannot be maintained that the arbitration award "draws its essence from the collective bargaining agreement." Enterprise Wheel, 363 U.S. 593 at 597. The CIR has exceeded its authority, and its award may not be enforced.

The Court is further of the opinion that the evidence before the CIR does not support its finding; because of this, the Court concludes that the CIR's "reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling . . ." Safeway Stores v. American Bakery & Confectionary Workers,

Local 111, 390 F.2d 79, 82 (5th Cir. 1968). 2/

2/ The analysis in Safeway Stores was not based on whether the evidence supported the award but was instead based on whether the source of the award was derived from the collective bargaining contract. The parties have not cited to the Court any Fifth Circuit cases concerning an absence of evidence to support the arbitrator's award. Other circuits, see discussion infra, have expanded the concept of an arbitrator exceeding his authority to include situations where there is no evidence to support the arbitrator's findings. This Court believes that the case at bar is analogous to decisions in other circuits where the award was vacated based on a finding of no evidence in the record. Because the Court has not found Fifth Circuit cases on point, the Court does not rest its holding on the following analysis.

The Sixth Circuit has recently considered the enforceability of an arbitrator's award where the record reveals no evidentiary support for the arbitrator's finding. In Storer Broadcasting Co. v. American Federation of Television and Radio Artists, 600 F.2d 45 (6th Cir. 1979), cert. denied, 102 S.Ct. 673 (1981), the arbitrator attempted to determine the meaning of profit sharing plan funds which were "vested" in the employees' favor. Following the district court's remand for the purpose of identifying the basis of the arbi-

trator's finding, the arbitrator indicated his conclusion was based on logic and inferences but he did not cite to facts in the record to support the conclusion. Reversing the district court's enforcement of the award upon its own fruitless search of testimony or documentary evidence in the record, the Court of Appeal for the Sixth Circuit stated that:

> If we were to allow an arbitrator to make a factual finding that a certain event occurred based upon an inference that said event should have occurred because an ambiguous document can be construed to make said event 'more logical,' then we would reduce the requirement that arbitration awards be supported by at least some evidence to a meaningless recitation which could easily be avoided by a clever arbitrator. This we decline to do.

Id. at 48 n. 12. Similarly, the Sixth Circuit refused to uphold an award in Detroit Coil Co. v. International Ass'n. of Machinists and Aerospace Workers, Lodge 82, 594 F.2d 575 (6th Cir), cert. denied, 444 U.S. 840 (1979), where the record revealed no support for the arbitrator's determinations. Detroit Coil focused on whether the parties had complied with a notification requirement regarding a particular grievance. The Court of Appeals found no evidence, either through the

intent of the parties or the parties' past practices, to support the arbitrator's finding. Distinguishing the situation from one in which an arbitrator errs in the determination of factual issues, the court held that an absence of any support in the record manifests a clear failure to draw the essence of the award from the collective bargaining agreement. Id. at 581. See Timken Co. v. Local Union 1123, United Steelworkers, 482 F.2d 1012, 1015 (6th Cir. 1973).

The First Circuit has established a somewhat similar rule: where the central fact underlying an arbitrator's decision is concededly a non-fact and where the parties cannot fairly be charged with the misapprehension, the award cannot stand. Electronics Corp. v. International Union of Electrical, Radio and Machine Workers, Local 272, 492 F.2d 1255, 1257 (1st Cir. 1974). The First Circuit held that the arbitrator's award of reinstatement for an employee, based on the arbitrator's belief that the failure to suspend the employee prior to discharging him violated the employee's right to industrial due process, could not stand where the em-

ployee had actually been suspended. The First Circuit directed the parties to submit the issues to a different arbitrator. Id. at 1258. See Proctor & Gamble Mfg. Co. v. Independent Oil and Chemical Workers, 386 F.Supp. 213, 225 (M. Md. 1974) (central fact must be a matter which is objectively ascertainable, and award will not be vacated where arbitrator merely misweighed conflicting evidence).

In the instant case, there is no evidence to support the CIR's finding that Jimmy R. Green was the holder of the master electrician's license for both Green Corporation and Hutton Corporation. See Jimmy R. Green's post-trial affidavit. Nor was there any evidence presented to the CIR with respect to local ordinances. Likewise, there was no evidence to support the CIR's finding that Jimmy R. Green's founding of Green Corporation and Hutton Corporation necessarily led to his operation of both corporations. The only evidence before the CIR to support its finding that Jimmy R. Green (not Green Corporation) exercises "substantial management, control and supervision of

Hutton" is Jimmy R. Green's status as sole shareholder and director of both corporations; even this fact has changed, however, for Jimmy R. Green resigned as director of Hutton. The Court thus holds that the CIR's award may not be enforced because the CIR exceeded its authority of restructuring the theory of the case and by making determinations which are not supported by evidence in the record. The award thus does not draw its essence from the labor agreement.

B. The Union is not entitled to affirmative relief

Acknowledging the Court's extremely limited power to review and vacate an arbitration award based on a finding that the award has no foundation in reason or fact, Boise Cascade, supra, as well as the very close question presented by the facts and circumstances of the case at bar, the Court has determined it is prudent to provide an alternative basis for its conclusion that the Union is not entitled to any relief in this action. For the purposes of this alternative and separate holding, the Court assumes that CIR correctly con-

cluded that Green Corporation violated the labor agreement, hereby entitling the Union to relief.

It is the opinion of the Court that the nature of the remedy is inextricably intertwined with the very substantial possibility that a violation of the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 et seq., would result if relief is granted to the Union. In both General Warehousemen & Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978), cert. dismiss'd, 443 U.S. 913 (1979), and Sperry Systems Management Division, Sperry Rand Corp. v. NLRB, 492 F.2d 63 (2d Cir.), cert. denied, 419 U.S. 831 (1974), the courts acknowledged that the private law of arbitration may conflict with the public law as expressed in the NLRA. In such cases, the former must yield to the latter, see Carey v. Westinghouse Electric Corp., 375 U.S. 261, 270-72 (1964), and the specific relief awarded must be closely examined precisely because of the implications an award may have with respect to the NLRA. Cf. Florida Marble, 653 F.2d 972, 976-77.

In Standard Brands, the arbitrator found that the

employer violated collective bargaining agreements by, inter alia, failing to disclose that it was closing its main manufacturing plant in Dallas, which would adversely affect the Dallas employees, and its operations would be transferred to its new plant in Denison. Different unions represented the Dallas and Denision [sic] employees. The issue in Standard Brands focused on the arbitrator's order that the employer transfer the willing Dallas employees to Denison with "superseniority" status. Both the district and appellate courts found that the arbitrator's remedy, which specified the working conditions and wages for the transferring Dallas employees, would necessarily interfere with the collective bargaining agreements between the Denison employees and their board-certified bargaining agent. Such interference would violate Sections 7 and 9(a) of the National Labor Relations Act, 29 U.S.C. §§157, 159 (a), which protect the rights of employees to bargain collectively with their bargaining agent regarding rates of pay, wages, hours of employment, and other working conditions. The Fifth Circuit acknowledged that the

implicit effect of the superseniority order would deprive the Denison employees of their agreed upon wages, conditions, and seniority. Standard Brands, 579 F.2d at 1291. Enforcement of this particular award could cause the employer to commit an unfair labor practice under 29 U.S.C. §158(a)(1). Id. The court commented:

> The right of employees to bargain collectively is at the heart of our federal policy governing labor management relations. Unions are vitally concerned, and properly so, with their right to bargain over wages, benefits, seniority and working conditions. Sectin 9(a) of the NLRA expressly recognizes such a right for a union if it is certified by the NLRA. If a contract or an arbitration award conflicts with that policy, the statutory policy must prevail.

Id. at 1293. Although the Fifth Circuit refused to enforce the arbitrator's award, it remanded the case to the arbitrator so that he could frame an appropriate award of lump sum damages; such an award was not only suggested by one of the parties, id. at 1294, but the employer acknowledged it violated the agreement, id., and a monetary award under the particular circumstances would not result in a violation of the NLRA.

Although the Standard Brands suit was brought pursuant to §301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), as is the present action, it relied, 579 F.2d at 1293, on Sperry Rand, in which the employer sought to set aside a National Labor Relations Board ("NLRB") order pursuant to §10(f) of the NLRA, 29 U.S.C. §160(f). In Sperry Rand, the employer charged that the board certified bargaining representative for the employer's New York employees was engaging in a sub rosa attempt through arbitration to gain recognition as the bargaining agent for the employer's California workers. The arbitrator ordered the application of all terms of the New York agreement to the California bargaining unit, with the exception of the representation provisions, since the Union had lost the election in its attempt to represent the California employees. The employer filed a complaint with the NLRB, charging the union with an unfair labor practice. The NLRB dismissed the complaint. The Second Circuit found, however, that the union failed to bargain collectively pursuant to §8(b)(3) of the NLRA, and also

violated §§7 and 8(a)(1) and 8(a)(2) of the NLRA by attempting to impose on employees of one unit the contract and bargaining agent of another unit, despite the fact that only wages and conditions of employment, rather than representation, were at issue. Sperry Rand, 492 F.2d 63, 69-70.

The Court thus concludes from its reading of Standard Brands and Sperry Rand that any remedy herein which involves the employees of Hutton Corporation would violate the NLRA. The NLRB had described a separate bargaining unit consisting of Hutton employees, see December 16 Findings, Findings of Fact 16-18, and any award which explicitely or implicitly binds them to the terms of the labor agreement or which affect their wages and fringe benefits would violate their rights to determine their own representative and terms of employment, and to bargain collectively.

The Union's counsel cites to International Ass'n of Heat and Frost Insulators and Asbestos Workers, Local 66 v. Leona Lee Corp., 84 LRRM 2165 (W.D. Tex. 1973),

aff'd 489 F.2d 1032 (5th Cir.), cert. denied, 419 U.S. 999 (1974), in reliance on its proposed post-trial damages theory. In Leona Lee, the employer breached a labor agreement with the union. The parties thereafter entered into a settlement agreement whereby the non-union employer agreed to transfer all of its assets to a union contractor, who would then sign a collective bargaining agreement with a different local of the plaintiff union. Following the signing of the collective bargaining agreement, the transferee contractor transferred all of its assets to newly formed non-unionized companies and then went out of business. Both courts affirmed the arbitrator's award of damages for the union's loss of bargaining power and goodwill, loss of dues, and costs of arbitration. In Leona Lee, however, unlike the present action, the evidence specifically focused on the damages sustained by the union which resulted from the employer's breach. The arbitration process consisted of three hearings in which voluminous documents and testimony demonstrated the actual damages sustained, such as the number of union mem-

bers being forced to leave the jurisdiction to obtain work as a result of the employer's breach as well as the accompanying harm to the union's reputation. 84 LRRM at 2167-28. Perhaps a more important distinction, however, between Leona Lee and the present action is the fact that the plaintiff union in Leona Lee not only requested these damages from the outset, but it satisfied its burden of production and persuasion with respect to the actual damages suffered in its hearing before the arbitrator and the district court. Id. at 2167, 2171.

In contrast, the Union herein made no request of the CIR[3/] or of this Court for a specific remedy. Nor did

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3/ The Union was apparently familiar with specific forms of relief. Both before the Joint Committee and the Interim Committee, the Union sought back pay, fringe benefits, application of the labor agreement to Hutton and damages for lost bargaining power and dues. See Defendant Green Corporation's Exhibits 4 and 5.

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the Union present any evidence of actual losses sustained as a result of Green Corporation's alleged breach of the labor agreement. The Court is of the opinion

that the Union is bound by Section 2.04(d) of the labor agreement; the CIR's decision is thus final and binding, and the Union is not now entitled to a remand so that the Union may submit to the CIR a request for relief or establish the actual losses sustained. See, Oil, Chemical & Atomic Workers Local 4-367 v. Rohm & Haas, Texas, Inc., No. 81-2418 (5th Cir. June 1, 1982) (per curiam) (issues submitted to arbitrator define the limits of the arbitration award, and where employer has complied with the specific arbitration order, scope of the award may not be broadened in enforcement action).

The Court is further of the opinion that the Union is not entitled to introduce before this Court evidence regarding damages. The parties have already proceeded to trial, which is in itself a somewhat extraordinary circumstance in an action which seeks enforcement of an arbitration award. At trial, the Union attempted to establish that Green Corporation violated the Labor [sic] agreement. At the time, the Union could have introduced evidence on damages. This the Union failed

to so. [sic] It is estopped from so doing now.

In the alternative, the Court concludes that the Union has obtained all the relief that is due: Jimmy R. Green has resigned as director of Hutton and has withdrawn his master electrician's license from use by Hutton. It thus appears that if any violation of the labor agreement has been committed, the violations have been rectified by the parties herein.

[sic: the place of footnote 4 within the text is not indicated in the original pleading.]

4/ The Court does not go so far as to hold this action is moot, as urged by Green Corporation.

The Court also notes Green Corporation's contention that the parties intended that grievances were to be resolved, not through damages, but through measures designed to correct or alleviate the specific complaints.

[sic: the place of footnote 5 within the text is not indicated in the original pleading.]

5/ Section 2.05 of the labor agreement provides:

> When any matter in dispute has been referred to conciliation or arbitration for adjustment, the pro-

> visions and conditions prevailing prior to the time such matter arose shall not be changes or abrogated until agreement has been reached or a ruling has been made.

It is arguable that an award of damages herein would not be one which "draws its essence from the collective bargaining agreement." Enterprise Wheel, 363 U.S. 593, 597.

The Court thus concludes that the Union is not entitled to any affirmative relief in this action. The Court bases its decision on two separate grounds: (1) the CIR exceeded its authority because its finding of a violation is without foundation in reason or fact; and (2) the Union has failed to establish that it has suffered actual damages. Accordingly, Judgment shall be entered in favor of Green Corporation and Hutton.

It is so ORDERED.

Dated this 30 day of June, 1982.

/s/
United States District Judge

LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, Plaintiff-Appellant,

v.

GREEN CORPORATION and Hutton Electric Company, Defendants-Appellees.

No. 82–1394.

United States Court of Appeals, Fifth Circuit.

Feb. 21, 1984.

United States District Court for the Northern District of Texas, Robert M. Hill, J., found an arbitration award invalid. On appeal, the Court of Appeals, Politz, Circuit Judge, held that: (1) it was not function of the court to comment on correctness or incorrectness of arbitrator's factual findings and legal conclusions, nor would court impress law of corporations, contracts, evidence or other legal rules and concepts upon situation and measure arbitrator's actions against them, and where arbitration award drew its essence from collective bargaining agreement, court would look no further, and (2) what remedy might be, if indeed one might be sought and secured at late postarbitration stage, was matter not for courts but for arbitrator to decide.

Reversed and ruling of arbitrator reinstated.

1. Arbitration ⇐73.7(1)

Judicial review of arbitration is sharply circumscribed, and scope of enforceable interpretation is concomitantly narrow.

2. Labor Relations ⇐483

Promotion of national policy favoring resolution of judicial disputes by arbitration eliminates searching judicial review of factual and legal accuracy of arbitrators' findings, and district court's conclusion that arbitrator's express finding that one corporation was alter ego of individual and another corporation and that other corporation was alter ego of such individual did not comport with legal interpretation of alter ego theory was finding beyond judicial ken.

3. Labor Relations ⇐483

It was not function of the court to comment on correctness or incorrectness of arbitrator's factual findings and legal conclusions, nor would court impress law of corporations, contracts, evidence or other legal rules and concepts upon situation and measure arbitrator's actions against them, and where arbitration award drew its essence from collective bargaining agreement, court would look no further. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

4. Arbitration ⇐73.7(1)

What remedy might be, if indeed one might be sought and secured at late postarbitration stage, was matter not for courts but for arbitrator to decide.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

In this appeal we again examine the tight constraints imposed on judicial review of the decisions of arbitrators in labor disputes. The district court found the arbitration award invalid. We disagree and reverse.

Facts

This dispute involves Local Union 59, International Brotherhood of Electrical Workers, AFL–CIO, Green Corporation, and Hutton Electric Company, as named parties, and Jimmy R. Green. Green Corporation is a Texas corporation with its principal office in Dallas, Texas. Green Corporation was incorporated on February 21, 1979 by Jimmy R. Green, its sole shareholder and director. Green Corporation performs electrical installations and general electrical work as a union contractor. Huttor Electric Company is a Texas corporation with its principal office in Dallas, Texas. Hutton Electric was incorporated on May 11, 1979 by Jimmy R. Green, its sole shareholder and director. Hutton Electric performs electrical installations and general electrical work as a nonunion contractor.

On July 19, 1979, Green Corporation and the Union signed a Letter of Assent, thereby becoming parties to a collective bargaining agreement by which Green Corporation recognized the Union as the exclusive representative of all of its employees with respect to wages and other conditions of employment. In March 1980, the Union filed a grievance against Green Corporation alleging violations of the bargaining

agreement as a consequence of the operation of Hutton Electric. The Union charged that the employees of Hutton Electric received wages and benefits below those established in the bargaining agreement. The Union further complained that Hutton Electric's employment of nonunion electricians in the Union's territorial jurisdiction reduced employment opportunities for Union members, thus adversely affecting both the Union and its members.

The Union contended that the challenged activities violated two sections of the bargaining agreement. The first is Article 3.00, Section 3.15, which provides:

> The Employer recognizes the Union as the exclusive representative of all its employees performing work within the jurisdiction of the Union for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

The second is Article 4.00, Section 4.12, which provides in relevant part:

> If and when the employer shall perform any electrical work under its own name or under the name of another, or as a corporation, company, partnership or any other business entity, including joint ventures, wherein the employer exercises any substantial degree of management, control, supervision, estimating, furnishing or loaning materials, trucks, tools and/or any other electrical equipment to another, the terms and conditions of this agreement shall be applicable to all such work.

The bargaining agreement established a Labor-Management Committee whose duties included the resolution of grievances. The Union's grievance was referred

to this committee but foundered on a tie vote. The grievance was then referred to an "interim" or regional committee and again fell victim to a tie vote. The parties resorted to Article 2.00, Section 2.04(d), of the bargaining agreement which designated an arbitrator with power to make final and binding decisions:

> Should the Labor-Management Committee fail to agree or to adjust any matter, such may be submitted jointly or unilaterally by the parties to this agreement to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decisions shall be final and binding on both parties hereto.

The arbitration panel (the CIR) had to decide whether the situation involving Hutton Electric and Green Corporation abridged Article 4.00, Section 4.12, of the bargaining agreement. In the informal atmosphere of the CIR's arbitration proceeding, evidence was presented which reflected that Jimmy R. Green was the incorporator, sole shareholder and sole director of both corporations, that he solicited business for both in the same trade area and that he used his master electrician's license, as required, for both corporations.

On May 27, 1980, the arbitration panel rendered a unanimous decision which we quote in full:

> After careful consideration of the evidence submitted, the Council rules as follows:
>
> 1. and 2. In the instant case Green Corporation is found in violation of Article 3.00, Section 3.15 and the third paragraph of Article 4.00, Section 4.12 of the agreement.

The CIR did not articulate any findings of fact in support of its conclusion and prescribed no remedies.

The Union thereafter filed the instant action, seeking to enforce the CIR's ruling and asking for damages and injunctive relief against Green Corporation and Hutton Electric. On December 16, 1981, the district court noted the inadequacy of the CIR's ruling and remanded it to the arbitration panel, stating:

> The Court is of the opinion that the CIR's one sentence decision provides no basis on which the Court may determine whether the CIR's "reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Safeway Stores v. American Bakery & Confectionary Workers Local 111*, 390 F.2d 79, 82 (5th Cir.1968). Consequently, the Court believes that a proper resolution of the present dispute requires a remand so that the CIR may state in writing the factual predicate upon which it based its determination that Green Corporation violated the labor agreement.

The CIR, responding to the district court, explained its basis and reasoning for concluding that the bargaining agreement had been violated. We quote the pertinent part:

> The factual basis for the CIR finding of a violation is as follows:
>
> 1. Jimmy R. Green was the sole *shareholder* of both Green Corporation and Hutton Electric Company.
>
> 2. Jimmy R. Green was the sole *director* of both Green Corporation and Hutton Electric Company.

3. Jimmy R. Green founded and incorporated Green Corporation and Hutton Electric Corporation within a two-month period in the spring of 1979 thereby indicating a purpose of establishing and operating both union and non-union in the same market. His letter of January 18, 1980, to Mr. John Harris clearly outlined his operations in the fourth paragraph.

4. In actual operation, Jimmy R. Green was the holder of the Master Electrician's license for both Green Corporation and Hutton Electric Company. This fact was clearly documented. This fact was readily acknowledged by Jimmy R. Green. A master electrician is required by ordinance to be responsible for and supervise all electrical work performed. This clearly establishes that Jimmy R. Green exercised supervision over the operations of both organizations.

The above facts clearly established in the minds of the members of the CIR that Jimmy R. Green was in fact the employer and that Hutton Electric Company was merely the alter ego of Jimmy R. Green and Green Corporation.

The violation of Article 3.00, Section 3.15 is reasoned as follows:

(a) The employer (Jimmy R. Green) recognized the union as the exclusive representative of his employees performing work within the jurisdiction of the union.

(b) Green Corporation (Jimmy R. Green) and Hutton Electric Company (Jimmy R. Green) are performing work within the jurisdiction of the union. Jimmy R. Green was the single employer. Green Corporation (Jimmy R. Green) abides by the contract. Hutton Electric Company (Jimmy R. Green) does not

> abide by the contract. Therefore, Green Corporation (Jimmy R. Green) is in violation of Article 3.00, Section 3.15.
>
> The same reasoning supports a violation of the third paragraph of Article 4.00, Section 4.12. The employer (Jimmy R. Green) agreed to perform any electrical work, under his own name or under the name of another, under the terms and conditions of the collective bargaining agreement. Green Corporation (Jimmy R. Green) complied. Hutton Electric Company (Jimmy R. Green) did not. Jimmy R. Green exercises substantial management, control and supervision of Hutton Electric Company. Therefore, a violation of the collective bargaining agreement language in Article 4.00, Section 4.12 occurred.

Having stated these findings and conclusions, the CIR underscored that no remedy had been requested and none had been suggested:

> The CIR did not consider the issue of remedy since none was requested and no supporting data was submitted by the Local Union to indicate what, if any, actual damage may have resulted to the Local Union as a result of these violations. The CIR decision established from the viewpoint of the CIR that the operations carried on by Jimmy R. Green under the guise of the Green Corporation and Hutton Electric Company constitute clear and willful violations of the collective bargaining agreement....

The district court considered the CIR's clarification and explanation, found the arbitrator's award to be without foundation in reason or fact and outside the essence of the labor agreement, and rejected the award.

Analysis

[1] Judicial review of arbitration is sharply circumscribed. In *Boise Cascade Corp. v. United Steelworkers of America, AFL–CIO, Local Union No. 7001*, 588 F.2d 127, 128 (5th Cir.1979), we observed:

> The scope of judicial review of arbitration awards is limited. The Supreme Court's seminal decisions on this issue are the *Steelworkers Trilogy: Steelworkers v. American Manufacturing Co.*, 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; *Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; *Steelworkers v. Enterprise Wheel & Car Corp.*, 1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. The Court in *Enterprise Wheel* held that
>
> > The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from him.
>
> 363 U.S. at 599, 80 S.Ct. at 1362. Similarly, the Court in *Warrior & Gulf* stated that "judicial inquiry ... must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made." 363 U.S. at 582, 80 S.Ct. at 1353.
>
> The premise of the *Steelworkers Trilogy* is that the court should allow the parties to a collective bargaining agreement containing a binding arbitration

> clause to receive the benefit of the bargain—*binding* arbitration on contract disputes.

The scope of enforceable interpretation is concomitantly narrow:

> To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement.... The requirement that the result of arbitration have "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract....

Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403, 412 (5th Cir.1969); *cf. Local No. 370, Bakery, Confectionary and Tobacco Workers Intern. Union of America, AFL-CIO v. Cotton Brothers Baking Co., Inc.*, 672 F.2d 562 (5th Cir.1982).

[2] In support of its conclusion that the arbitration award was without foundation in reason or fact, the district court stated:

> The CIR express finding that Hutton is the alter ego of Jimmy R. Green and Green Corporation and the CIR's implicit finding that Green Corporation is the alter ego of Jimmy R. Green do not comport with the *legal* interpretation of the alter ego theory.

This finding is beyond judicial ken. The promotion of the national policy favoring the resolution of labor disputes by arbitration eliminates searching judicial review of the factual and legal accuracy of arbitrators' findings. *See e.g. Amalgamated Meat Cutters & Butchers Workmen of North America, District Local No. 540 v. Neuhoff Bros. Packers, Inc.*, 481 F.2d 817 (5th Cir.1973); *Safeway Stores v. Bakery*

Workers' Local 111, 390 F.2d 79 (5th Cir. 1968); *Dallas Typographical Union v. A.H. Belo Corp.*, 372 F.2d 577 (5th Cir. 1967).

[3] From what it considered to be the evidence before it, the arbitration panel determined that Green Corporation, Hutton Electric and Jimmy R. Green were, *de facto*, one and the same. We refrain from commenting on the correctness or incorrectness of the arbitrator's factual findings and legal conclusions. That is not our function. Nor shall we impress the law of corporations, contracts, evidence, or other legal rules and concepts upon this situation and then measure the arbitrator's actions against them. We consider that to be inconsistent with the national arbitration policy and the many decisions limiting judicial oversight. What we might have done to resolve the factual and legal issues were we the deciding body is of no moment. We are not the trier of fact nor the elucidator of the bargaining agreement. The arbitrator, by active choice of the parties, exclusively performs those functions.

We conclude that the arbitration award draws "its essence from the collective bargaining agreement," *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. at 597, 80 S.Ct. at 1361. We look no further.

[4] In an alternative holding, the district court expressed the opinion that if the arbitration award is upheld it would not be enforceable because enforcement would occasion an unfair labor practice against the employees of Hutton Electric under § 7 of the National Labor Relations Act, 29 U.S.C. § 157. We recognize that arbitration orders that result in unfair labor practices are unenforceable. *General Warehouse-*

men & Helpers v. Standard Brands, 579 F.2d 1282 (5th Cir.1978). But that is not the case before us. The CIR, in describing its ruling as a narrow one, precisely noted that no remedy was sought, suggested or awarded.

What the remedy may be ultimately, if indeed a remedy may be sought and secured at this late post-arbitration stage, is, in itself, a matter not for the courts but for the arbitrator to decide. *Oil, Chemical & Atomic Workers, Etc. v. Rohm & Haas, Texas Inc.*, 677 F.2d 492 (5th Cir.1982).

The judgment of the district court is REVERSED and the ruling of the arbitrator is REINSTATED.

David R. Richards, Esq.
600 West 7th Street
Austin, TX 78701
Counsel for Respondent

This 15th day of June, 1984.

Ira J. Smotherman, Jr.
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served true and correct copies of the within and foregoing JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT upon all parties by depositing said copies in the United States Mail with adequate postage affixed thereon to ensure delivery and addressed as follows:

Ms. Nancy H. Doherty, Clerk
United States District Court
Northern District of Texas
Dallas Division
1100 Commerce Street
Room 15-C-22
Dallas, TX 74242

Gilbert F. Ganucheau, Clerk
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